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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 318

SAFWAY PRODUCTS, INC. AND
R. D. WERNER CO., INC.,
Petitioners,

v.

UP-RIGHT, INC.,
Respondent.

PETITIONERS' MEMORANDUM IN RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION

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1. At the core of respondent's argument concerning Rule 52 (a)—though the Rule and its criteria are not mentioned in respondent's brief—is the erroneous premise that this case in the trial court involved only undisputed facts. Such an assumption is wholly inaccurate, and respondent does not and could not furnish any authority from the record for the statements in respondent's brief to such effect. The record of recurring conflicts in the evidence, reflecting sharply disputed issues of fact, is to the contrary (see R. 872-878). A summary of these as arising in the testimonial evidence appears in a footnote on page 7 of the petition herein, and is not contradicted by respondent.

Such disputes were most heavily concentrated upon issues relating to modes of operation and to results of the respective devices, though to some extent they concerned structure. Now respondent itself admits (Brief pp. 3-4) that there was dispute concerning the comparative speed, efficiency and safety of the Johnson and Aldek devices—in other words as to "result". The assertion that there was no dispute as to the "intended" result of the devices is a word game concerning the irrelevant.

The Court of Appeals saw no demonstration of the comparative mechanics of the devices in question (R. 877). It did not even see upper sections of the devices. It saw no demonstrations of the kinds such as were witnessed in the courtroom and outside the courtroom by the trial judge, as detailed at page 7 of the petition.

We emphasize that petitioner is not, as respondent appears to suggest (Brief, p. 10), here seeking another hearing on the facts. Petitioner complains it was error for the Court of Appeals to conduct in its deliberations a *de novo* hearing and to make in its decision a *de novo* determination, of the evidentiary and ultimate facts. The Court of Appeals simply stepped around any question of whether the findings of the District Court were "clearly erroneous", as provided by the Rule. Second, the Court had before it only the cold print of testimony without any opportunity to judge of the credibility of five live witnesses, and made simply no allowance for the trial court's opportunity to do so, as provided by the Rule. In addition, the Court of Appeals had no opportunity at all, as had the trial court, to observe a score of instances of the

operation and results in the field, of upper and lower scaffold sections of the devices in question; modifications of those devices made and offered in evidence by *respondent*; and prior art devices.

An attempt to redetermine the facts without being able to take into account these matters ignores the spirit as well as the letter of Rule 52(a). See the note of the Advisory Committee (1937) to Rule 52, set forth in 5 MOORE'S FEDERAL PRACTICE, ¶52.01[4]. We are confident that any trier of fact who was able to consider all these would reach the same result as the District Court did upon them. We are not seeking that the facts be decided again here. Such an attempt would be as impossible a task for this Court as it was for the Court of Appeals, if any meaning is given Rule 52(a). Respondent's argument (Brief, p. 7), compatable with the approach of the Court of Appeals herein, would render Rule 52(a) practically meaningless by stripping it of any applicability in a case which is "not incomprehensible to courts of law." But such an argument and such an approach are in direct conflict with the *Graver Tank* decisions of this Court, and the Seventh Circuit *Kennatrack* and *Bailey* decisions, all cited at page 11 of the petition herein.

2. Petitioners presented under questions 2 and 3 (Petition, pp. 2-3) certain questions of law germane to the issues of infringement in this case. Adherence to prior decisions of this Court and Courts of Appeals, pertinent to such questions, would require a holding of noninfringement in this case as a matter of law. The conflicts between such decisions and the decision of the Court of Appeals herein are discussed at pages 12-13, and 14-16, of the petition.

Respondent has not attempted by argument to discuss these conflicts. It has, however, attempted to restate the questions presented by petitioners, and thereby to omit petitioners' questions 2 and 3. We do not concur in the form of questions as stated by respondent, and we do not join in its purported elimination of these matters of law from the case.

3. For the reasons set forth herein and in the Petition for Certiorari, review of this case should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this Court, hereby certifies that the foregoing brief was this day served upon Messrs. Oscar A. Mellin and Carlisle M. Moore, counsel for the respondent herein, by depositing same in a United States Postbox, with first class, air mail postage prepaid, addressed to their law office address of record herein.

Dated: September 23, 1963.

MARVIN S. SLOMAN